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No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

DONALD W. MCLAREN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a suspect makes an ambiguous request for counsel during a custodial interrogation, must the interrogator cease questioning until the suspect is provided with counsel?

2. May the Judge Advocate General of an Armed Force who is not authorized to make appointments under the Appointments Clause of the Constitution, appoint commissioned officers to serve as trial and military appellate judges, on the theory that their appointment as commissioned officers already satisfies the Appointments Clause for both their judicial and non-judicial duties?

3. Does the Due Process Clause of the Fifth Amendment require that, in peacetime, military trial and appellate judges be appointed to their judicial duties for fixed terms?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Donald W. McLaren, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on September 28, 1993.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, issued on September 28, 1993, is reported at 38 MJ 112 (C.M.A. 1993) (Appendix A). The opinion of the United States Air Force Court of Military Review, issued on March 26, 1992, is reported at 34 MJ 926 (A.F.C.M.R. 1992) (Appendix B).

JURISDICTION

The final order of the United States Court of Military Appeals was entered on September 28, 1993. The jurisdiction of this Court is invoked under 28 USCA § 1259(3) (Supp. 1992) and 10 USCA § 867(a) (Supp. 1992).

STATEMENT OF THE CASE

On April 15, 1990, Office of Special Investigations Agent (SA) Sarantis received a complaint that the appellant was sexually abusing the older of his two stepdaughters. On April 16, SA Sarantis interviewed both stepdaughters at the base clinic. On 17 April, SA Sarantis went to the appellant's on-base quarters intending to advise Mrs. McLaren of the allegations against her husband and to ask her to accompany him to the base clinic. Both the appellant and Mrs. McLaren answered the door. SA Sarantis told Mrs. McLaren that he needed to speak with her in reference to her daughter who was at the clinic. SA Sarantis explained that her daughter was not hurt, but that a matter had come up and he needed to speak with her at the clinic. Mrs. McLaren then accompanied SA Sarantis and SA Bianco to the clinic. The appellant followed in a second car. When they reached the parking lot of the base clinic, the appellant asked what was going on. SA Sarantis responded that he would talk to the appellant later on. Later that day, SA Sarantis and SA Bianco returned to the appellant's quarters and Sarantis indicated that he was now ready to talk with the appellant. SA Sarantis, SA Bianco and the appellant then drove to the clinic in an Air Force Office of Special Investigations (OSI) vehicle and then went to the conference room where the appellant was read his rights by SA Sarantis. SA Sarantis advised the appellant of his right to counsel and then informed him that he was suspected of rape, carnal knowledge and assault with a deadly weapon. When SA Sarantis asked the appellant if he wanted a lawyer, appellant responded, "Not at this time." When asked if he wanted to make a statement, the appellant indicated that he wanted to talk.

After some preliminary questions, SA Sarantis steered the conversation toward the allegations of sexual abuse. SA Sarantis asked the appellant when he first had sex with

his older stepdaughter. The appellant responded, "These things happen." SA Sarantis then repeated the question. At this point, the appellant looked down and said something to the effect of "I think I want a lawyer," or "I think I need to talk to a lawyer." SA Sarantis responded, "Well, yes, these charges seem—are serious." SA Bianco said, "Yes, this is a decision that you'll have to make. We can't force you to stay here. You need to decide what you want to do." SA Sarantis testified that after sitting for a further period of time in silence, the appellant eventually began talking again and then orally confessed to the charged offenses. His oral confession was then typed, signed and sworn to.[1]

On 9-11 August 1990, the petitioner was tried by general court-martial at San Vito dei Normanni Air Station, Italy. Prior to entry of appellant's conditional pleas of guilty, the defense moved to suppress the appellant's 17 April 1990 confession. The defense maintained that these statements were taken in violation of Article 31, U.C.M.J. and the Fifth Amendment of the United States Constitution. The military judge denied the defense motion finding, that "[a]fter a pause, and apparent reflective deliberation about his verbalized thoughts concerning his perceived need for a lawyer, [appellant] resumed the interrogation process by proceeding to answer the incriminatory question previously posed." Additionally, he found that "[t]he agents reasonably construed this resumption by the accused as an election by him not to then act on his perceived need, if any, for a lawyer." In accordance with his conditional pleas, he was found guilty of one specification of attempted rape, in violation of Article 80, Uniform Code of Military Justice [hereinafter cited as

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[1] This statement of facts is derived in part from the military judge's finding of essential facts below on the defense motion to suppress.

UCMJ], one specification of rape on divers occasions in violation of Article 120, UCMJ, two specifications of sodomy on divers occasions, in violation of Article 125, UCMJ, and three specifications of indecent acts, in violation of Article 134, UCMJ. He was sentenced to a dishonorable discharge, confinement for 35 years, forfeitures of $424.00 pay per month for 420 months, and a reduction to the lowest enlisted rank (E-1). The convening authority approved the sentence as adjudged on 20 November 1990, however, pursuant to a pretrial agreement, he reduced the confinement to 15 years.

On 26 March 1992, the Air Force Court of Military Review affirmed the findings and sentence as modified pursuant to the pretrial agreement. *United States v. McLaren,* 34 M.J. 926 (A.F.C.M.R. 1992). The Air Force Court of Military Review found that the appellant's statement was at most "an equivocal request for counsel." 34 M.J. at 929, and that the appellant re-initiated the interrogation following a period of silence. On 3 June 1992, Petitioner then submitted a Petition for Grant of Review with the United States Court of Military Appeals asserting two issues of error. On October 2, 1992, that Court granted appellant's Petition and ordered the submission of additional briefs. After hearing oral argument, the Court of Military Appeals affirmed the lower court's decision. (*United States v. McLaren,* 38 M.J. 112 (CMA 1993) (Appendix A). The Court of Military Appeals held that, due to the failure of the OSI agents to conduct a limited inquiry to clarify the appellant's comment, that the equivocal request for an attorney "was the same as if the appellant had unequivocally requested a lawyer". Nonetheless, the Court upheld the conviction on the grounds that "the appellant's voluntary reinitiation of the interview and implied waiver of his previously invoked right to counsel were sufficient to satisfy *Edwards v. Arizona,* 451 U.S. 477 (1981) and *Smith v. Illinois,* 469 U.S. 91, 95 (1984).

With respect to question 1, this petition incorporates substantially the same brief as was submitted by United States Navy counsel in *Davis v. United States,* No 92-1949 (*cert. granted* on 1 November 1993). Like *Davis,* this case is concerned with the consequences of an ambiguous request for counsel during a custodial interrogation. State, federal and military courts, are currently applying three conflicting approaches with regard to whether such a request invokes the 5th Amendment protections of *Miranda v. Arizona,* 384 U.S. 436 (1966).

With respect to Questions 2 and 3, this petition incorporates essentially the same brief which was submitted by United States Navy counsel in *Weiss v. United States,* No. 92-1482, and by United States Army counsel in *Barkley v. United States,* No. 92-1646, and *Doucette v. United States,* No. 93-68. Like *Weiss,* this petition raises two closely related questions (merged here into Question 2) which go to the heart of judicial independence for military trial and appellate judges, almost all of whom are commissioned officers and lawyers on active duty. Unlike judges appointed under Article I or Article III, military judges are not appointed by the President with the advice and consent of the Senate. Nor are they appointed for fixed terms.

Instead, military judges are selected and appointed by the Judge Advocate General of their respective service for such periods of time as the Judge Advocate General determines. The decision to select, transfer and reassign officers to and from their judicial duties is absolute and discretionary. In other words, those judges lack any protection from being removed and/or reassigned in the event the Judge Advocate General is not satisfied with their opinions, rulings or service.

Military trial judges are, for all practical purposes, the equivalent of United States District Judges and Magistrate

Judges who preside over criminal trial in federal district courts. The drafters of the Uniform Code of Military Justice wanted military judges to be "real judges" as commonly understood in the American legal tradition. *United States v. Graf,* 35 MJ 450, 465 (1992). The military trial judge has far-ranging discretionary powers, including the power to "rule on all interlocutory questions and all questions of law raised during the court-martial," to "[i]nstruct the members [jury] on questions of law and procedure which may arise," to "promulgate and enforce rules of court." and to "exercise contempt power." UCMJ Art. 48, 10 USC § 848 (1988). If the accused elects a bench trial, a general court-martial judge has even more discretion than does a district judge because the court-martial trial judge is not bound by the Federal sentencing guidelines, *See United States v. Brown,* 28 MJ 470, 474 n.3 (CMA 1989); *see generally* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1002.

Courts of Military Review exercise all of the traditional powers of appellate courts including those under the All Writs Act. *See Dettinger v. United States,* 7 MJ 216 (CMA 1979). Additionally, these courts exercise an "awesome, plenary, *de novo* power of review." *United States v. Cole,* 31 MJ 270, 272 (CMA 1990). Thus, a court "[m]ay affirm only such findings of guilty and the sentence . . . as it finds correct in law and fact . . . [I]t may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact." UCMJ Art. 66(c), 10 USC § 866(c)(1988).

Several days before it heard argument in *Weiss,* the Court of Military Appeals issued an opinion rejecting the due process claim. *United States v. Graf,* 35 MJ 450 (CMA 1992).[2] Then, on December 24, 1992, a sharply

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[2] A petition for writ of certiorari in *Graf* was filed on December 29, 1992 (No. 92-1102), and it is incorporated by reference. In the interest

divided court rejected petitioner Weiss' Appointments Clause argument and affirmed the Navy-Marine Corps Court's decision. *United States v. Weiss,* 36 M 224 (CMA 1992), *cert. granted,* 103 S Ct 2412 (May 24, 1993).

The court did not revisit *Graf* where it had overruled Graf's due process objection to the lack of fixed terms of office for military judges for two reasons. First, *Graf* rejected the balancing test set forth in *Matthews v. Eldridge,* 424 US 319 (1976), which had long been used to resolve Fifth Amendment due process claims. Instead, the court used the less exacting Fourteenth Amendment due process standard enunciated in *Medina v. California,* 112 S Ct 2572 (1992), which involved review of a state criminal conviction. Second, *Graf* treated dicta from *United States ex rel. Toth v. Quarles,* 350 US 11 (1955), and *Palmore v. United States,* 411 US 389 (1973), as approving the lack of fixed terms of office, and announced a new rule that military judges could not be removed in retaliation for their judicial decisions. Nowhere did the Court of Military Appeals suggest that military necessity precluded fixed terms for military judges generally, let alone for those who sit on the Courts of Military Review in the Washington, D.C., area, or for courts-martial that are held in peacetime.

REASONS FOR GRANTING THE WRIT

I. A SPLIT AMONG VARIOUS STATE AND FEDERAL COURTS EXISTS OVER WHAT STANDARD A COURT SHOULD USE FOR DETERMINING THE CONSEQUENCES OF AN AMBIGUOUS REQUEST FOR COUNSEL

Three conflicting standards are used by state and federal courts for determining the consequences of an ambiguous

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of completeness, this petition will summarize the *Graf* decision, as well as the reasons for granting review of the due process issue.

request for counsel during a custodial interrogation. *Smith v. Illinois,* 469 U.S. 91, 95-96 and n.3 (1984). The court should resolve this conflict in order to ensure consistency among the lower courts in their approach to this issue. As Justice White observed in a recent order denying a petition for writ of certiorari on this issue:

> [It] is apparent that a substantial number of criminal defendants who are identically situated in the eyes of the Constitution have received and will continue to receive dissimilar treatment [after making an ambiguous request for counsel.] [B]ecause of the different approaches taken by the lower courts, I would grant certiorari.

Mueller v. Virginia, 113 S.Ct. 1880, 1881 (1993)(White J., dissenting).[3]

An accused who invokes his right to counsel during a custodial interrogation may not be subjected to further interrogation until counsel is made available to him, unless the accused initiates further communication. *Edwards v. Arizona,* 451 U.S. 477, 484-85 (1981); *See Miranda v. Arizona,* 384 U.S. 436, 474 (1966).[4] However, this Court has left unresolved the issue of whether the *Edwards* bright-line rule applies when an accused makes an ambiguous invocation of his right to counsel. *Smith v. Illinois,* 469 U.S. at 96. The court should issue a writ of certiorari in order to resolve this issue.

Some courts have adopted the position that all questioning must cease once a suspect mentions the word "attorney" or "counsel." *See e.g., Maglio v. Jago,* 580 F.2d

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[3] Justice Blackmun and Justice Souter joined in the dissent.

[4] "The bright-line rule of *Edwards* also applies to military interrogations." *United States v. Applewhite,* 23 M.J. 196, 198 (C.M.A. 1987).

202, 205 (6th Cir. 1978); *People v. Alexander,* 261 N.W.2d 63 (Mich. 1977), *cert. denied sub nom Michigan v. Borman,* 426 U.S. 958 (1978); *People v. Superior Court of Mono County,* 542 P.2d 1390, 1394-95 (Cal. 1975, *cert. denied,* 429 U.S. 816 (1976). These courts have based their reasoning upon a broad reading of *Miranda's* requirement that all questioning stops once an accused "indicates in any manner" that he wants to speak with an attorney. *Maglio v. Jago,* 580 F.2d at 205.

In stark contrast to those decisions, some courts have taken a more restrictive approach, holding that there exists a threshold of clarity which an accused must reach before he has invoked his right to counsel. *See e.g., Virginia v. Mueller,* 422 S.E.2d 380, 387 (Va. 1992), *cert. denied,* 113 S.Ct. 1880 (1993); *People v. Krueger,* 412 N.E.2d 537, 540 (Ill. 1980), *cert. denied,* 451 U.S. 1019 (1981); *Dean v. Commonwealth,* 844 S.W.2d 417, 420 (Ky. 1992); *Russell v. State,* 727 S.W.2d 573, 575 (Tex. Crim. App., 1987)(*en banc*), *cert. denied,* 484 U.S. 856 (1987). These courts have attempted to restrict the scope of *Edwards* to only situations where an accused has "clearly asserted" his right to counsel. *Virginia v. Mueller,* 422 S.E.2d at 387.

Other courts, including the court below, have adopted a third approach, where all questioning must cease except for narrow questions to clarify the earlier ambiguous request. *See, e.g., United States v. Porter,* 776 F.2d 370 (1st Cir. 1985); *United States v. Gotay,* 844 F.2d 971, 975 (2nd Cir. 1988); *United States v. Riggs,* 537 F.2d 1219, 1222 (4th Cir. 1976); *United States v. Cherry,* 733 F.2d 1124, 1130-31 (5th Cir. 1984); *United States v. Fouche,* 776 F.2d 1398, 1405 (9th Cir. 1985); *Towne v. Dugger,* 899 F.2d 1104 (11th Cir. 1990), *cert. denied,* 498 U.S. 991 (1990). These courts have placed an affirmative duty on law enforcement personnel to actively ascertain whether an in-

dividual has, in fact, invoked his right to counsel. By applying this standard, the United States Court of Military Appeals has joined the division among the courts.

In applying the third approach, the court below failed to apply the correct standard for determining the consequences of an ambiguous request for counsel. The appellate court below should have followed the first approach which would have required the interrogators to cease all questioning once the petitioner mentioned the word "attorney." This approach allows a qualified attorney to clarify an accused's request, and also protects an accused from being badgered by police officers to answer further questions when he wants to invoke his fundamental right to counsel.

II. THE METHOD OF APPOINTING MILITARY OFFICERS TO DUTY AS TRIAL AND APPELLATE JUDGES VIOLATES THE APPOINTMENTS CLAUSE OF THE CONSTITUTION AND THE LACK OF ANY FIXED TERM FOR THOSE JUDICIAL OFFICES VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

This petition, like *United States v. Weiss,* seeks to establish minimum standards for the appointment of military judges and their retention in office for fixed terms. It does not seek to have the Uniform Code of Military Justice or the military justice system mirror that of Article III courts. Rather, it seeks to ensure that the separation of powers requirements embodied in the Appointments Clause, and the notions of fundamental fairness embodied in the Due Process Clause of the Fifth Amendment, are available to those who are tried by courts-martial. Taken alone, either the Appointments Clause or the Due Process violations would seriously

undermine the fairness of the military justice system, but occurring together they call into question whether anyone in the armed forces can receive the minimal level of judicial independence that every justice system requires.

A. THE APPOINTMENTS CLAUSE VIOLATION

The Appointments Clause precludes Congress from placing the power to appoint inferior officers in anyone other than the President alone, the Court of Law, or the Heads of Departments. US Const. Art. II, § 2, Cl. 2. *Freytag v. Commissioner,* 111 S Ct 2631 (1991). There can be little doubt that military judges, who exercise extraordinary authority and discretion, are Officers of the United States and are subject to the Appointments Clause. *See Buckley v. Valeo,* 424 U.S. 1, 126 (1976) (per curiam). No judge of the Court of Military Appeals disagreed with that proposition except Judge Crawford and her position was specifically disavowed by the Department of Justice.

There is considerable force to the argument that military appellate judges are "superior" or "principal" officers, in which case the President must appoint them with the advice and consent of the Senate. But in any event, both military trial and appellate judges are at least inferior officers, and so they must be appointed either by the President, the Head of a Department, or by a Court of Law. No court has held that military judges are appointed to their judicial offices by any of the authorities listed in the Appointments Clause; the only question is whether their appointment as military judges, after they have been duly appointed as military officers must be made by one of the authorities set forth in that clause.

In this case it is not simply that the Judge Advocates General, who appoint military judges, are not listed in the Appointments Clause, but they are the supervisors of all

military lawyers who serve in military courtrooms, including all of those who prosecute criminal cases on behalf of the United States. In addition, the Judge Advocates General, or the Assistant Judge Advocates General, write the annual fitness reports of the members of each service's Court of Military Review, which are then used to decide the appellate judges' promotions, future duty assignments, and susceptibility to involuntary early retirement. Indeed, the due process implications of this particular appointment arrangement raise independent concerns that strongly reinforce the Appointment Clause objections.

B. THE DUE PROCESS VIOLATION

The reasons the Court should grant review on this question are set out in the previously-filed *Graf* petition and are only summarized below. But first, it is worth noting that, although the two issues presented in this question arise under different constitutional provisions, the defects involve common concerns of accountability and fundamental fairness to an accused. Noncompliance with each of the provisions is magnified by the lack of compliance with the other, such that there is a synergistic impact on the accused's rights. To further compound the problem, the Judge Advocate General can both appoint and remove military judges, yet he is also responsible for supervising the efficient working of the military justice system, including its prosecutors.

The lower court's application of *Medina's* Fourteenth Amendment due process analysis to a *federal* Fifth Amendment due process claim is ample reason to hear the case. Indeed, in *Medina* this Court left open the correctness of one of its prior decisions—*United States v. Raddatz,* 447 US 667, 677 (1980)—which had applied *Matthews v. Eldridge* to a due process challenge to a

federal criminal conviction. Petitioner believes that respect for state legislative judgments and concerns of federalism, which loomed so large in *Medina,* have no place where federal due process rights are at issue, but the uncertainty created by *Medina* underscores the need for this Court to settle an issue that only it can resolve.

Certainly, in time of war or other serious exigency, military necessity may require some adjustments regarding the tenure of trial judges, although not for the appellate judges who comprise the four Courts of Military Review. Moreover, neither the government nor the Court of Military Appeals has sought to justify the lack of any fixed term of office on grounds of military necessity. Instead, the Court of Military Appeals relied on other claimed protections against improper retaliation against military judges for unpopular decisions—some of which it first announced in *Graf*—although none of them can be invoked by an accused, even if they were actually, as opposed to theoretically, available to the judges themselves. But even if those protections served to prevent naked retaliation, they cannot possibly guard against the more subtle and virtually undetectable chilling influences of adverse or "faint praise" fitness reports that can have significant impacts on promotions, future assignments, and susceptibility to involuntary early retirement for all military judges.

The Court below has failed to justify this massive exception to the generally accepted principle of American jurisprudence that judicial independence for those who preside at criminal trials and hear criminal appeals is an absolute minimum protection for an accused, as reflected in such due process cases as *Tumey v. Ohio,* 274 US 510 (1927), and in the nearly universal fact that state judges serve for fixed terms of office.

CONCLUSION

The questions presented are genuinely important and affect not only petitioner, but the right of millions of Americans serving in the armed forces. Petitioner asks this Court to resolve the issue of what standard a court should use for determining the consequences of an ambiguous request for counsel during a custodial interrogation. In doing so, the court will resolve the split among the lower courts on this important question of Constitutional law and ensure that all defendants are treated equally. In addition, the cumulative impact of the constitutional appointments and due process errors in petitioners case warrants this Court's attention, consideration and action. For all the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 1993

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 68,117
CMR No. 28996

UNITED STATES, APPELLEE

v.

DONALD W. MCLAREN, STAFF SERGEANT
U.S. AIR FORCE, APPELLANT

Argued May 10, 1993
Decided Sept. 28, 1993

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38 M.J. 112

For Appellant: *Captain David D. Jividen* (argued); *Colonel Terry J. Woodhouse* and *Major Mary C. Yastishock* (on brief).

For Appellee: *Captain Carlos L. McDade* (argued); *Colonel Richard L. Purdon, Lieutenant Colonel Jeffery T. Infelise, Major Paul H. Blackwell, Jr.* (on brief).

Military Judge: J. Jeremiah Mahoney

Opinion of the Court

GIERKE, Judge:

Pursuant to his conditional pleas of guilty, appellant was convicted of attempted rape, rape, sodomy (2 specifications), and committing indecent acts with his

stepdaughters (3 specifications), in violation of Articles 80, 120, 125, and 134, Uniform Code of Military Justice, 10 USC §§ 880, 920, 925, and 934, respectively. The general court-martial, composed of officer and enlisted members, sentenced appellant to a dishonorable discharge, 35 years' confinement, forfeiture of $424.00 pay per month for 420 months and reduction to E-1. The convening authority reduced the confinement to 15 years pursuant to a pretrial agreement, but otherwise approved the sentence. The Court of Military Review affirmed the findings and the approved sentence. 34 MJ 926 (1992)

This Court granted review of the following Issues:

I

WHETHER APPELLANT'S FIFTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE MILITARY JUDGE FAILED TO SUPPRESS APPELLANT'S STATEMENTS TO THE AFOSI [AIR FORCE OFFICE OF SPECIAL INVESTIGATIONS] AFTER HE STATED "I THINK I WANT A LAWYER" OR WORDS TO THIS EFFECT AND THE AFOSI FAILED TO CEASE THEIR QUESTIONING OR CLARIFY APPELLANT'S REQUEST FOR COUNSEL.

II

WHETHER THE MILITARY JUDGE ERRED, TO THE SUBSTANTIAL DETRIMENT OF APPELLANT, WHEN HE DENIED THE DEFENSE CHALLENGE TO A COURT MEMBER, CAPTAIN JAMES, WHO REFUSED TO CONSIDER THE PUNISHMENT OPTION OF "NO PUNISHMENT."

I. *Admissibility of Confession*

A. *Factual Background*

On April 15, 1990, OSI Special Agent (SA) Sarantis received a complaint that appellant was sexually abusing the older of his two stepdaughters. On April 16, SA Sarantis interviewed both stepdaughters at the base clinic. On April 17, SA Sarantis went to appellant's on-base quarters, intending to advise Mrs. McLaren of the allegations and ask her to accompany him to the base clinic. Both appellant and Mrs. McLaren answered the door. SA Sarantis told Mrs. McLaren that he "needed to speak with her in reference to her daughter [A] who was at the clinic. [He] explained that [A] was not hurt but that an incident had come up and [he] needed to speak to her and [A] at the clinic." Mrs. McLaren accompanied SA Sarantis and SA Bianco to the clinic. Appellant followed in a separate car. In the parking lot of the base clinic, appellant "wanted to know what was going on." SA Sarantis told him, "No, we'll talk to you later." Later that same day SA Sarantis and SA Bianco returned to appellant's quarters and Sarantis said, "Okay, we can have that conversation now. Let's go over to the clinic."

Appellant accompanied SA Sarantis and SA Bianco to the clinic in an OSI vehicle, and they went to a conference room inside the clinic. SA Sarantis advised appellant of his rights including his right to counsel and informed him that he was suspected of rape, carnal knowledge, and assault with a deadly weapon. When SA Sarantis asked appellant if he wanted a lawyer, appellant responded, "Not at this time." When asked if he wanted to make a statement, appellant indicated that he wanted to talk.

After a few introductory questions, SA Sarantis steered the conversation toward the allegations of sexual abuse. SA Sarantis testified, "As I was coming right up to it, he

began to well up inside. He came up and his eyes were filling full of water. He just kind of—from the outside it looked as if he was about to burst, just as we were there." SA Sarantis asked appellant when he "first had sex with" his older stepdaughter. Appellant replied, "These things happen." Agent Sarantis then repeated the question. Appellant then looked down and said something to the effect, "I think I want a lawyer," or "I think I need to talk to a lawyer." SA Sarantis responded, "Well, yes, these charges seem—are serious." SA Bianco said, "Yes, this is a decision that you'll have to make. We can't force you to stay here. You need to decide what you want to do."

SA Sarantis testified that after a brief pause, without further questions or comments from the two special agents, appellant "began talking again." SA Bianco testified that when appellant began talking again, he responded to SA Sarantis' most recent question, saying, "It just happened" and shaking his head, "Yes." The interview then resumed, and appellant orally confessed. His oral confession was then typed, signed, and sworn to.

Appellant testified on the motion to suppress as follows:

> It was after he asked me—Mister Sarantis asked me about when was the first time I had sex with [A] and I replied, "Whoa, I want a lawyer," and he asked my why and I told him because he was accusing me of having sex with [A]. And then when he—he said that "We were not accusing you. We knew it was true. We have statements. We need the details." I looked over at Mister Bianco and he was scribbling out.

Appellant testified further that he "sat there for a few minutes and Mister Sarantis asked me again about—'We need to know when was the first time you had sex with [A].' "

The military judge denied appellant's motion to suppress his confession because "[a]fter a pause, and apparent reflective deliberation about his verbalized thoughts concerning his perceived need for a lawyer, [appellant] resumed the interrogation process by proceeding to answer the incriminatory question previously posed." Additionally, he found that "[t]he agents reasonably construed this resumption by the accused as an election by him not to then act on his perceived need, if any, for a lawyer."

The Court of Military Review found that appellant's statement, "I think I want a lawyer," or "I think I need to talk to a lawyer" was at most "an equivocal request for counsel." 34 MJ 926, 929 (1992). That court further held that appellant re-initiated the interrogation following a period of silence after SA Bianco told him it was his decision as to how to proceed. The court below concluded its analysis and holding as follows:

> In sum, after [appellant] uttered his equivocal reference to counsel, the investigators ceased their interrogation. Their subsequent comments were neutral and provided [appellant] the opportunity to clarify his vague statement. [Appellant] reinitiated the interrogation by resuming the conversation, even though he did not explicitly clarify his earlier reference to counsel. Focusing on this narrow factual scenario, we hold that where a suspect voluntarily reinitiates discussions related to the investigations, he effectively clarifies the earlier ambiguous request for counsel. At that point, investigators have no further obligation to pursue the suspect's indecision and may resume the interview. [Appellant's] confession was otherwise voluntary and properly admitted in evidence against him. His Fifth Amendment rights were not violated.

34 MJ 931-32.

B. ***Discussion***

Appellant argues that: (1) his request for counsel ("I think I want a lawyer") was not equivocal; (2) assuming *arguendo* that his request for counsel was equivocal, the investigators should have considered the right to counsel invoked and ended the interrogation rather than seek clarification of appellant's equivocal request for counsel; and (3) assuming *arguendo* that the investigators should have clarified appellant's equivocal request for counsel, they failed to do so in this case.

The Government argues that appellant's request for counsel was equivocal. According to the Government, the mere mention of the term "counsel" or "attorney" is not enough to require termination of a suspect's questioning. *See United States v. Whitehead,* 26 MJ 613, 617 (ACMR 1988) ("Maybe I should get a lawyer" not unequivocal request for lawyer); *United States v. Brown,* 27 MJ 614 (ACMR 1988), *aff'd,* 28 MJ 232 (CMA 1989) (accused's request to speak to prosecuting attorney in private prior to interview not an unequivocal request for counsel) *cert. denied,* 492 U.S. 907 (1989); *United States v. Fouche,* 833 F. 2d 1284, 1286-87 (9th Cir. 1987) (I "might want to talk to a lawyer" not an unequivocal request for lawyer), *cert. denied,* 486 U.S. 1017 (1988). According to the Government, appellant confessed after making a silent reflection on his ambiguous request for counsel. The Government argues that appellant's subsequent unsolicited discussion of the allegations amounted to a voluntary re-initiation of the interview and waiver of his right to counsel. We hold that the military judge did not abuse his discretion by admitting appellant's confession.

An accused in custody, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has

been made available to him," unless he validly waives his earlier request for the assistance of counsel. *Edwards v. Arizona,* 451 U.S. 477, 484-85 (1981). "[W]hen counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Minnick v. Mississippi,* 498 U.S. 146, 153, 111 S. Ct. 486, 491 (1990). Once an accused has invoked his right to counsel, the police may not conduct "further interrogation" about the offenses "until counsel has been made available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police." *Edwards v. Arizona,* 451 U.S. at 484-85.

While the words, "I think," used by appellant in this case, could render a request for counsel equivocal, they are not in themselves dispositive. The language of appellant's comment must be evaluated in the context of the circumstances in which it was spoken. Appellant's comment was in response to the first accusatory question in this interview, indicating that the question caused him to reconsider his earlier waiver of counsel (when he responded, "Not at this time" to the questions regarding counsel).

Nevertheless, even if we assume without deciding that appellant's request for counsel was equivocal, the OSI agents had only two choices: (1) terminate the interview or (2) conduct limited questioning to clarify appellant's comment. *United States v. Davis,* 36 MJ 337, 341 (CMA 1993). Because they did neither, the situation was the same as if appellant had unequivocally requested a lawyer. Accordingly, appellant's responses to further questioning about the offenses were admissible only if "he (a) initiated further discussion with the police, and (b) knowingly and intelligently waived the right he had invoked." *Smith v. Illinois,* 469 U.S. 91, 95 (1984). The court below held that appellant voluntarily initiated further conversation with

the OSI agents, effectively clarifying and waiving his earlier request for counsel. 34 MJ at 931.

The Government had the burden of establishing that appellant voluntarily resumed the interrogation once he invoked his right to counsel, even if that invocation was equivocal. *See Lego v. Twomey,* 404 U.S. 477, 489 (1972) (prosecution has burden of establishing admissibility of confession by preponderance of evidence); *Miranda v. Arizona,* 384 U.S. 436, 475 (1966) ("If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained of appointed counsel.").

After appellant mentioned a lawyer, the agents told him they could not force him to stay in the interview room, and they told him he needed to decide what he wanted to do. They asked no further questions. After a brief pause, appellant answered the question SA Sarantis had asked before appellant mentioned a lawyer.

The military judge found that appellant voluntarily reinitiated the conversation and waived his previously invoked right to counsel. He initiated the conversation by talking after the agents told him that they could not force him to stay and that he needed to make a decision; he waived his previously invoked right to counsel by answering the previously asked question which had preceded his mention of a lawyer. We are satisfied that appellant's voluntary reinitiation of the interview and implied waiver of his previously invoked right to counsel were sufficient to satisfy *Miranda v. Arizona* and *Smith v. Illinois,* both *supra.* Accordingly, we agree with the Court of Military Review that the military judge did not abuse his discretion in admitting the challenged statement.

II. *Challenge for Cause.*

A. *Factual Background*

When trial moved on to the challenge procedures, defense counsel focused on the court members' attitudes toward a sentence of "no punishment." The maximun period of confinement for the offenses to which appellant had pleaded guilty was life imprisonment. Appellant had negotiated a pretrial agreement limiting confinement to 15 years.

Prior to voir dire of the court members, the military judge gave extensive preliminary instructions, including the following:

> The essential question concerning your qualification as a court member is simply whether or not you can render an impartial decision based solely upon the evidence and law presented to you in this court. You should have no predisposition toward one side or the other, nor should you have a predisposition as to the kind or amount of punishment which might be appropriate for the offenses of which the accused has been convicted.

In his voir dire of the members, the military judge asked, "Will you avoid forming an opinion as to the kind or amount of punishment which may be appropriate until all the evidence and law has been presented to you?" All members responded in the "affirmative." He then asked, "And will each agree to follow the law as I give it to you?" Again, all members responded in the "affirmative."

During his general voir dire, defense counsel questioned the members as follows:

> Would you all agree with me that what you have in front of you and what Sergeant McLaren has

> pled guilty to and been found guilty of are some of the most serious offenses known to the law?
>
> An affirmative response from all members.
>
> The reason why I ask you that is that at this point in the trial, according to the judge's instructions, you are not to have any particular sentence in mind, either lenient or very severe, or any kind of a sentence. My next question is a very serious question. It's not facetious in any way. None of my questions will be. But at one point in the trial, the judge is going to tell you that no punishment is an option. With regard to whether that is a reasonable or a ridiculous idea at this point in time, without having any presentation of evidence, is there anyone on this jury that can honestly and seriously consider no punishment just by what you've read in front of you?

Defense counsel individually polled the members, and all but two of the eleven, including Captain James, responded, "No." Defense counsel then asked:

> Okay. Now, for those of you who have said no, let me explain a little bit further now. The judge will give you instructions that you have to consider all lawful sentences and even no punishment. And he may further explain to you that no punishment really is a possibility here. Without seeing any evidence—now, I'm not saying that once you saw evidence you might change your mind. You might say—you know, who knows what might come before you. Would that change any of the people who said no to possibly there is a real possibility they just might adjudge or vote for no punishment? Would anybody change their

mind just from what you have in front of you at this point?

Defense counseled indicated that all members responded in the negative to this question.

During individual voir dire, defense counsel questioned Captain James further as follows:

Q. Very briefly, Captain James, I just want to get something clear on the response to the question about no punishment. Do you remember when I was asking you about that?

A. Yes, Sir.

Q. Now, even though that with what you've got in front of you might not seem to be a very reasonable idea, without hearing anything, could you consider it in the deliberation room or would that not be possible at all?

A. Based on what you gentlemen have already told me today as far as the individual admitting that he did do what's in front of me, no, I could not consider no punishment in this case.

Q. Could you consider something other than no punishment that may not be very severe?

A. I'd have to review the facts in this.

Q. Okay, based on review of the facts, based on what evidence you hear, medical and otherwise?

A. That's right.

* * *

(Question by the military judge:)

Q. As I gathered, you have no problem in believing that you can decide an appropriate sentence, in other words, discuss and deliberate with the other members and vote on a[n] appropriate sentence, based upon the facts presented about the accused and the offenses and the law as I give it to you in this court?

A. That's correct, Sir, I do.

MJ: Okay. Any other questions?

DC: Yes, Sir, there is.

(Questions by the defense counsel:)

Q. Now, Captain James, you certainly are expected to take your knowledge of the world and your own moral convictions and so forth into the deliberation room. You don't go in there in a vacuum. But do you have some particular moral conviction that would inflame your passions that would lead you to a severe sentence that you may want to tell us before we continue?

A. No, only that what you have written in front of me, I do not consider as appropriate or right.

Q. Neither do I, Sir, but that's—

A. That's where I'm coming from.

DC: That's it. Okay, thank you.

Neither the military judge nor either counsel inquired further.

During his sentencing instructions, the military judge instructed the members, "There is no minimum punishment

which must be imposed." The sentence worksheet included a sentence: "To no punishment."

Defense counsel did not object or request further instructions on the option of "no punishment." During his closing argument on sentence, defense counsel conceded that a sentence to no punishment in this case would be "ridiculous."

B. ***Discussion***

Appellant contends that the military judge committed prejudicial error by denying a challenge for cause against Captain James. We hold that the military judge did not abuse his discretion.

RCM 912(f)(1)(N), Manual for Courts-Martial, United States, 1984, provides that a member will be excused for cause when the member "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." This ground for challenge is intended to cover situations where the member "has an inelastic opinion concerning an appropriate sentence for the offenses charged." RCM 912(f)(1)(N), Discussion. RCM 912(f)(3) provides, "The burden of establishing that grounds for a challenge exist is upon the party making the challenge."

We have long recognized that "challenges for cause are to be liberally granted." *United States v. Glenn,* 25 MJ 278, 279 (CMA 1987). At the same time, we have recognized the military judge's superior position in evaluating the demeanor of court members and, therefore, we have granted great deference on appeal to, and will not reverse, a ruling on a challenge for cause absent a clear abuse of discretion. *United States v. Deain,* 5 USCMA 44, 17 CMR 44 (1954) We recently set out the standards regarding challenges for military judges and appellate courts in

United States v. White, 36 MJ 284, 287 (CMA 1993) as follows: "[M]ilitary judges must follow the liberal-grant mandate in ruling on challenges for cause, but we will not overturn the military judge's determination not to grant a challenge except for a clear abuse of discretion in applying the liberal-grant mandate."

In evaluating challenges for cause based on claims of an inelastic attitude, we have held that an unfavorable inclination toward an offense is not automatically disqualifying. *See United States v. Bannwarth,* 36 MJ 265, 267-68 (CMA 1993) (no place in Air Force for drug users); *United States v. Reynolds,* 23 MJ 292 (CMA 1987) (strong distaste for barracks larceny); *United States v. Cosgrove,* 1 MJ 199 (CMA 1975). "[T]he test is whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions." *United States v. McGowan,* 7 MJ 205, 206 (CMA 1979).

We have also observed that a member's responses to "artful, sometimes ambiguous" questioning do not necessarily require that a challenge for cause be granted. *United States v. Tippit,* 9 MJ 106, 108 (CMA 1980). This case represents the epitome of artful questioning and inaccurate response. Defense counsel first obtained the agreement of the entire panel that his client had pleaded guilty to "some of the most serious offenses known to the law." Next he suggested that a sentence of no punishment might be an unreasonable idea. Finally, he closed the trap by asking Captain James if, without hearing any evidence, he could accept defense counsel's admittedly unreasonable suggestion and vote for no punishment.

The military judge clarified Captain James' response by asking Captain James if he could adjudge an "appropriate sentence, based upon the fact presented about the accused and the offenses and the law as I give it to you in this court." Captain James unequivocally responded that he

could. What defense counsel's artful questioning established was that Captain James could not comprehend how appellant's offenses, in an evidentiary vacuum, could warrant no punishment. What the military judge's questioning established was that Captain James would follow the law.

Although the military judge could have done more to clarify Captain James' views, he did establish that Captain James' difficulty with imagining how such an apparently serious offense could warrant no punishment would yield to the evidence and the law. Accordingly, we are satisfied that the military judge did not abuse his discretion by denying the challenge for cause.*

III. *Decision*

The decision of the United States Air Force Court of Military Review is affirmed.

Judges COX and CRAWFORD concur.

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* I would have substantial misgivings about holding that a military judge abused his discretion by refusing to excuse a court member who could not in good conscience consider a sentence to no punishment in a case where all parties agree that a sentence to no punishment would have been well outside the range of reasonable and even remotely probable sentences.

SULLIVAN, Chief Judge (concurring in part and in the result):

I concur with Judge Gierke's excellent opinion on Issue II. On Issue I, I concur in the result reached but not the path to it, In my view, and in the view of the Court of Military Review, *United States v. McLaren,* 34 MJ 926, 929 (AFCMR 1992), appellant's statement, "I think I want a lawyer," was "an equivocal request for counsel." Once appellant made that statement, the Office of Special Investigations (OSI) agents ceased all substantive questioning and limited their comments to clarifying appellant's ambiguous statement. __ MJ at (5). The record also supports the conclusion that appellant clarified his intentions regarding a request for counsel. *See United States v. March,* 999 F.2d 456 (10th Cir. July 9, 1993). Without any pressure from the OSI agents and without further questioning regarding the suspected offenses, appellant continued to answer the previously asked question. I agree with the court in *March* that "[t]his is the clarification required in the face of an ambiguous request for counsel. . . . " 999 F.2d at __.

WISS, Judge (concurring in part and dissenting in part):

I agree with the majority's treatment of the second issue. I agree, as well, with its analysis of the first issue that leads it to conclude that appellant's statement in issue was *at least* an equivocal request for a lawyer (*see Cannady v. Dugger*, 931 F.2d 752, 755 (11th Cir. 1991) (" 'I think I should call my lawyer' was an *unequivocal* request for counsel" (emphasis added)); *see generally Connecticut v. Barrett*, 479 U.S. 523, 529 (1987) ("broad, rather than a narrow, interpretation [should be given] to a defendant's request for counsel")); that the agent's only choices at that point were to either "(1) terminate the interview or (2) conduct limited questioning to clarify appellant's comment" (*United States v. Davis*, 36 MJ 337, 341 (CMA 1993)); that what the agents in fact did was "neither";* and that, ac-

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* The Chief Judge is of the view that appellant's statement was an equivocal or ambiguous request for an attorney and that the agents' statements and conduct were no more than a permissible effort to clarify the equivocation, citing *United States v. March*, 999 F.2d 456 (10th Cir. 1993). *March* is easily distinguishable in both respects.

The suspect's relevant response there was, "Do you think I need an attorney?" Such a question obviously indicates that the suspect is *contemplating* the exercise of the right, as the Court of Appeals recognized; but it does not fairly imply that the suspect has *decided* to exercise the right. I do not believe the same can be said of appellant's response: "I think I want an lawyer," or "I think I need to talk to a lawyer." The court in *Cannady v. Dugger*, 931 F.2d 752, 755 (11th Cir. 1991), held that a virtually identical response "was an *unequivocal* request for counsel" (emphasis added), and I think there is much to be said for that conclusion.

Second, the agents' response in *March*—where the suspect had *asked* them *whether* he needed a lawyer—certainly was no more than a fair effort to clarify whether he had made a decision and, if so, what it was. I believe that an agent's comments to the effect that the suspect *will have to decide whether he wants a lawyer* is a fair effort to clarify a *question* posed by the suspect like the one in *March*; it is *more* than

cordingly, "the situation was the same as if appellant had unequivocally requested a lawyer." __ MJ at (14). From that point on, however, I disagree with the reasoning reflected in the majority opinion, so I dissent from the resolution of that issue.

Succinctly, I believe that what the agents said and did following appellant's statement about a lawyer was intended as, and was in fact, an encouragement to keep talking; as such, appellant's ultimate acquiescence in continuing the interview cannot lawfully be viewed as being an initiation by him, so the continued questioning was unlawful. *See Minnick v. Mississippi,* 498 U.S. 146 (1990); *Edwards v. Arizona,* 451 U.S. 477, 484-85 (1981).

In order to more sharply focus the basis for this judgment, I pose the following hypothetical that parallels the fact pattern of this case except that the invocation of the right to a lawyer is absolutely unequivocal:

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that when the suspect's response is an affirmative *statement* showing at least a contemplation of the need for a lawyer, like the one in this case.

These agents had appellant on the ropes. He was distraught; he obviously felt overwhelming guilt; and he was on the virtual brink of an emotional outpouring of grief – and evidence. Suddenly, there was an expression of a wish for a lawyer. Faced with the desire to do everything legally possible to keep appellant talking, I believe that unfortunately they crossed the line of the legally possible: Instead of honoring what might well be viewed as an unequivocal counsel request or instead of limiting themselves to the ministerial clarification of whether appellant was equivocally expressing a wish for an attorney (a mechanical process), they proceeded with words and deeds that were designed to induce appellant to reconsider his rights' invocation (a cognitive process). *See generally United States v. March,* 999 F.2d at __ ("These clarifying questions must be purely ministerial, not adversarial, and cannot be designed to influence the subject not to invoke his rights.").

Interrogator: We have just read you your rights, and now we want to talk to you about our suspicions that you have raped and otherwise sexually molested your stepdaughters. Do you want a lawyer?

Suspect: Not at this time.

Interrogator: All right. Let's begin by my asking you . . . [follows is a series of relatively innocuous questions and answers that lead into the allegations of sexual abuse of his stepdaughers].

Interrogator: When did you first have sex with your older daughter?

Suspect: [Visibly emotionally distraught] These things happen.

Interrogator: I'd like to know, when did you first have sex with your older daughter?

Suspect: I want a lawyer before I go any further with this questioning—I want a lawyer.

Interrogator: Well, yes, these charges seem—are serious.

Interrogator #2: Yes, this is a decision you'll have to make. We can't force you to stay here. You need to decide what you want to do.

[Brief pause]

Suspect: It just happened.

[Etc.]

In this context of an unquestionably unequivocal assertion of his right to the presence of a lawyer, I believe it is clear that the comments and the pause by the agents at a minimum are an effort to provide the suspect an oppor-

tunity to reconsider the invocation and, more realistically, are a psychological encouragement to do so and to continue talking. That is illegal, *Edwards v. Arizona, supra.* Such a tactic is likewise illegal in the context of the case at bar, where "the situation was the same as if appellant had unequivocally requested a lawyer." __ MJ at (14). *See generally Colorado v. Connelly,* 479 U.S. 157, 168 (1986)(prosecution has burden to prove by preponderance of the evidence that defendant waived rights).

APPENDIX B

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 28996

UNITED STATES

v.

STAFF SERGEANT DONALD W. MCLAREN, FR547-35-0428
UNITED STATES AIR FORCE

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26 March 1992

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34 M.J. 926

Sentence adjudged 11 August 1990 by GCM convened at San Vito dei Normanni Air Station, Italy. Military Judge: J. Jeremiah Mahoney.

Approved sentence: Dishonorable discharge, confinement for 15 years, forfeiture of $424 pay per month for 420 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain David D. Jividen (argued), Colonel Jeffrey R. Owens, Major John V. Sullivan, and Major Paul M. Dankovich.

Appellate Counsel for the United States: Major Ann M. Mittermeyer (argued), Colonel William R. Dugan, Jr., Lieutenant Colonel Brenda J. Hollis, Major Paul H. Blackwell, Jr., and Captain Carlos L. McDade.

Before

LEONARD, RIVES, and JAMES
Appellate Military Judges

OPINION OF THE COURT

RIVES, Judge:

What must investigators do when a suspect who has waived his rights says, "I think I want a lawyer"? Appellant contends his Constitutional rights were violated when his interview resumed without a clarification of the statement. We disagree with that and his other assertions of error and affirm.

After the motion to suppress his confession was denied, the appellant, Staff Sergeant Donald W. McLaren, entered a conditional guilty plea[1] to raping and attempting to rape one of his stepdaughters, and committing sodomy and a variety of indecent acts with both of his stepdaughters. *See* R.C.M. 910(a)(2); *United States v. Forbes,* 19 M.J. 953 (A.F.C.M.R. 1985). He was sentenced by officer and enlisted members to a dishonorable discharge,

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[1] We cannot determine whether the conditional plea was properly accepted in this case. The record fails to disclose whether the ruling on the suppression motion was case-dispositive; the victims might will have testified, and the confession might have been superfluous evidence. If so, the conditional plea simply preserved for appeal an issue which was moot and yet which carried in it seeds that could have grown into an appellate reversal. We criticized this practice in *United States v. Phillips,* 32 M.J. 955 (A.F.C.M.R. 1991), noting that one solution on appeal in such a case is to set the plea aside as improperly accepted. *See* R.C.M. 910(a)(2). This case was tried before we decided *Phillips,* before this problematic aspect of conditional pleas was revealed. However, as we noted, "Staff judge advocates and military judges should not permit conditional pleas that only preserve issues that would not terminate the prosecution . . . ." *Phillips,* 32 M.J. at 957.

confinement for 35 years, forfeiture of $424 pay per month for 420 months, and reduction to E-1. Complying with a pretrial agreement, the convening authority reduced the period of confinement to 15 years and approved the other aspects of the sentence.

I

In December 1986, while stationed at Vandenberg Air Force Base, California, McLaren married V. The couple moved into base housing with V's two daughters, ages 11 and 5. Within a few months, McLaren began an abhorrent sexual excapade with his stepdaughters, progressing from initial experiments of indecent acts with the younger girl to forcible acts of sodomy with both girls, and eventually to raping the older girl. His crimes continued through his reassignment to San Vito Air Station, Italy, in June 1988, until he was caught in April 1990.

On 15 April 1990, the Air Force Office of Special Investigations (OSI) detachment at San Vito received information about McLaren's crimes. Agents Sarantis and Bianco, both 3-year veterans of the OSI, investigated the case. On 16 April, the agents interviewed the older girl at the base clinic. The following afternoon, the agents went to McLaren's base residence, identified themselves in his presence, explained that they needed to talk with V about her older daughter, and transported V to the clinic. McLaren followed the agents to the clinic in a separate car, approached them in the clinic parking lot, and stated his desire to talk with them. Without indicating the true subject of their investigation, Sarantis told McLaren they first needed to speak with V and the older girl and would talk to him later. McLaren stated he would be available and returned home. Later that afternoon, after interviewing both girls and medical personnel, the agents again went to

McLaren's house, invited him to speak with them, and transported him to the base clinic.

At the clinic, the agents took McLaren to an unoccupied conference room where Sarantis formally re-identified himself, informed McLaren of the offenses of which he was suspected, and advised him of his rights by reading an Air Force Form 189 (rights advisement card). After being informed of his right to counsel, McLaren responded to the agent's question by stating he did not want a lawyer. He affirmatively waived his right to remain silent and agreed to answer questions.

After some introductory questions designed to put McLaren at ease, Sarantis asked him when he had first had sex with his older stepdaughter. McLaren replied, "These things happen." Sarantis then repeated the question. McLaren looked down and said something to the effect, "I think I want a lawyer," or "I think I need to talk to a lawyer." After a brief pause, Sarantis stated, "Yes, this is a serious matter," and Agent Bianco said, "Yes, this is a decision you'll have to make. We can't force you to stay here. You need to decide what you want to do." After a brief period of silence and with no further questions, McLaren began an emotional confession. The agents resumed their questioning, continued for about an hour, then adjourned to the OSI offices where they assisted McLaren in preparing a written statement. Before he signed the statement, the agents once again formally advised him of his rights, including his right to counsel. McLaren waived each of his rights by initialing and signing the form.

II

Appellant contends that his Fifth Amendment rights were violated when the military judge refused to suppress

his statements to the OSI after he said, "I think I want a lawyer," or words to that effect. He asserts the OSI agents erred by failing to either stop the interview or clarify his request for counsel. Under the facts of this case, we disagree.

The Fifth Amendment to the Constitution provides: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." To enforce the promise of this venerable safeguard, both legislative and judicial remedies have evolved to ensure that individual rights are respected during police operations and that personal will is not overborne by investigative zeal.

For those in the military, Article 31(a) of the Uniform Code of Military Justice reinforces the Fifth Amendment guarantee by forbiding anyone subject to the code from "compel[ling] any person to incriminate himself or to answer any question the answer to which may tend to incriminate him." Article 31(b) directs that anyone who suspects another of an offense may not question him without first informing him of the offenses of which he is suspected, his right to remain silent, and the possibility that any statement he makes may be used against him in a court-martial. Article 31(d) provides the enforcement mechanism, barring the admission in evidence of any statement received in violation of the article.

In its landmark case of *Miranda v. Arizona,* 384 U.S. 436 (1966), the Supreme Court set forth the familiar rights advisement requirements whenever police conduct a "custodial interrogation." Included is the requirement that police advise the suspect of his right to the presence of counsel during questioning. The Court of Military Appeals applied *Miranda* to military investigations in *United States v. Tempia,* 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967); *see also* Mil. R. Evid. 305(d). Thus, any statement

obtained during a custodial interrogation[2] in violation of a suspect's right to counsel is inadmissible in a court-martial.

In *Miranda,* the Supreme Court ruled that if a suspect "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." 384 U.S. at 444-45. Later, the Court established the bright-line rule that "an accused . . . having expressed his desire to deal with police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police." *Edwards v. Arizona,* 451 U.S. 477, 484-85 (1981); *see also United States v. Harris,* 19 M.J. 331 (C.M.A. 1985) (applying *Edwards* to the military). In *Smith v. Illinois,* 469 U.S. 91, 98 (1984), the Court noted, "Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease."

We must first determine whether McLaren's comments were an unambiguous request for counsel. To do so, we examine the ordinary meaning of his words within the context of the circumstances leading up to his remark, but not

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[2] After our preliminary examination of this record, we specified the issue of whether the interrogation here was custodial as required to implicate the right to counsel under *Miranda.* In his findings of fact on the suppression motion, the military judge found that McLaren was properly advised of both his Article 31 rights and his rights to counsel. Inherent in the latter finding is a determination that the accused was in fact "in custody" at the time of the interrogation. "Custody" is evaluated by "how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty,* 468 U.S. 420, 442 (1984). Applying this standard to the facts, we find that the interrogation of appellant was custodial, and hence the advisement as to the right to the presence of counsel was appropriate.

his statements or actions that followed. *Smith,* 469 U.S. at 100. We find that the words "I think I want a lawyer" or "I think I need to talk to a lawyer" did not signal a definite intention or desire on McLaren's part, but simply hinted that he was considering his options. McLaren's statement alluding to his possible desire to consult with an attorney amounts at most to an *equivocal* request for counsel.

Both *Edwards* and *Oregon v. Bradshaw,* 462 U.S. 1039 (1983), a subsequent Supreme Court decision discussing an effective waiver of *Miranda* rights and reinitiation of interrogation by an accused, involved *un*equivocal invocations of the right to counsel. McLaren's equivocal invocation of the right to counsel will first be tested against the *Edwards* standard.

Edwards requires investigators to stop questioning after a suspect invokes his right to counsel, unless the suspect "initiates" further exchanges with the police. 451 U.S. at 484-85. In *Bradshaw,* the Supreme Court reaffirmed *Edwards,* clarifying "initiation" to mean inquiries or statements that "represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation." 462 U.S. at 1045; *see also United States v. Applewhite,* 23 M.J. 196 (C.M.A. 1987); *United States v. Groh,* 24 M.J. 767 (A.F.C.M.R. 1987). The Court has also explained that the prosecution must independently establish both initiation of the discussion and a knowing, intelligent, and voluntary waiver of the previously invoked right. *Moran v. Burbine,* 475 U.S. 412, 421 (1986); *Bradshaw,* 462 U.S. at 1044-46. The existence of a waiver depends upon " 'the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused.' " *Id.* at 1046 (quoting *North Carolina v. Butler,* 441 U.S. 369, 374-75 (1979) and *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938)). A waiver need not be explicit, but

may be inferred from the suspect's actions and statements. *Butler,* 441 U.S. at 373.

McLaren's confession followed a period of silence after Agent Bianco told him it was his decision as to how to proceed. Although his confession occurred at the same location and within a relatively short period of time after the agents stopped their questioning, it was in fact voluntary, uncoerced, and unprompted by the agents' intervening remarks. Hence, we find that McLaren reinitiated the interrogation, as occurred in *Bradshaw.* Examining these circumstances within the context of his background, experience, and previous conduct during the investigation, we further find that he knowingly, intelligently, and voluntarily waived his right to counsel. Though he did not articulate it as such, he clearly decided to continue without counsel. That decision was the product of his reflection, initiative, and willingness to cooperate.

When a suspect unequivocally expresses a desire for an attorney, investigators must halt all questioning. However, as in the case before us, where a suspect's remarks are vague and ambiguous, the appropriate response is less certain and is not clearly governed by the *Edwards* rule. The Supreme Court has explicitly declined to resolve the broader issue of whether an equivocal statement constitutes an invocation of the right to counsel. *Connecticut v. Barrett,* 479 U.S. 523, 529-30 n.3 (1987); *Smith,* 469 U.S. at 95-96.

Courts have adopted three different approaches to resolving cases involving the equivocal assertion of rights. *See generally* Annotation, *What Constitutes Assertion of Right to Counsel Following Miranda Warnings—Federal Cases,* 80 A.L.R. Fed. 622 (1986); Annotation, *What constitutes Assertion of Right to Counsel Following Miranda Warnings—State Cases,* 83 A.L.R. 4th 443 (1991). Some courts read *Miranda* liberally and require that even upon a

vague reference to an attorney or ambiguous behavior evidencing a possible desire for counsel, all questioning must cease. *E.g., People v. Randall,* 1 Cal 3d 948, 83 Cal. Rptr. 658, 464 P.2d 114 (1970). Others take a more conservative approach, holding that there exists a "threshold of clarity" beyond which officers must halt an interrogation. *E.g., People v. Krueger,* 82 Ill. 2d 305, 45 Ill. Dec. 186, 412 N.E.2d 537 (1980), *cert. denied,* 451 U.S. 1019 (1981). Still other courts, in an attempt to balance the rights of an accused with prosecutorial interest, require that after an equivocal reference to counsel, investigators must limit further questioning to inquiries seeking clarification of the suspect's desires. *E.g., United States v. Fouche,* 833 F.2d 1284 (9th Cir. 1987), *cert. denied,* 486 U.S. 1017 (1988).[3] This procedure avoids the inflexible rule that precludes further questioning after any vague reference to counsel, but provides investigators and the courts with a standard that protects suspects who want an attorney but "whose requests fail to meet an arbitrary threshold of clarity." *Hampel v. State,* 706 P.2d 1173, 1180 (Alaska App. 1985). Along with the Army Court of Military Review, this Court has adopted the latter approach, permitting questions that seek clarification. *See United States v. Mathis,* 31 M.J. 726 (A.F.C.M.R. 1990); *United States v. Palmer,* 29 M.J. 929 (A.F.C.M.R. 1989); *United States v. Whitehead,* 26 M.J. 613 (A.C.M.R. 1988).

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[3] A majority of the Circuit Courts of Appeal now follow this approach. *See United States v. Porter,* 776 F.2d 370 (1st Cir. 1985); *United States v. Gotay,* 844 F.2d 971 (2nd Cir. 1988); *United States v. Riggs,* 537 F.2d 1219 (4th Cir. 1976); *United States v. Cherry,* 733 F.2d 1124 (5th Cir. 1984); *Smith v. Endell,* 860 F.2d 1528 (9th Cir. 1988), *cert. denied,* __ U.S. __ 111 S.Ct. 510 (1990); *Towne v. Dugger,* 899 F.2d 1104 (11th Cir.), *cert. denied,* __ U.S.__, 111 S.Ct. 536 (1990).

In *Whitehead,* the accused commented during a post-polygraph interview, "Maybe I should get a lawyer." The interviewing agent then remarked, "Well this is your decision; it's a decision you're going to have to make." After a brief pause, the agent continued, "If you didn't do anything wrong, Ed, you don't need one, right?" 26 M.J. at 615. The Army Court found the accused's comments to be an equivocal request for counsel, and ruled that investigators had the responsibility to make reasonable attempts at clarification if they desired to continue questioning. *Id.* at 618. The court implicitly accepted the trial judge's ruling that the agent's initial remarks advising the accused of his decision were "the essence of the request for clarification." *Id.* at 616. The court then focused on the final remark and determined the investigator was trying to dissuade the accused for exercising his right to counsel. Thus, the court held it was not an attempt at clarification, but rather "subtle but continued interrogation" that "served to mislead the appellant and to undermine his ability to invoke his right to counsel." *Id.* at 619.

We now turn our attention to the OSI agents; responses in this case, evaluating their actions in light of their responsibility to cease questioning and to seek clarification. The agents' remarks were neutral[4] in content and spontaneous in nature. If anything, Agent Sarantis' remark about the seriousness of the offenses would tend to encourage a suspect to stop the interview and consult with counsel. Agent Bianco's remarks reinforcing the need for appellant to make a decision can reasonably be viewed as an attempt to prompt appellant to clarify his desires. Following careful scrutiny of the record, we conclude that the agents' remarks were neither designed to nor had the

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[4] *Cf. Hall v. State,* 336 S.E.2d 812, 819 (Ga. 1985) (agents' remarks found to be "neutral").

effect of misleading, dissuading, or further interrogating appellant. Hence, the agents did not violate their responsibility to halt the interrogation.[5]

In sum, after McLaren uttered his equivocal reference to counsel, the investigators ceased their interrogation. Their subsequent comments were neutral and provided McLaren the opportunity to clarify his vague statement. McLaren reinitiated the interrogation by resuming the conversation, even though he did not explicitly clarify his earlier reference to counsel. Focusing on this narrow factual scenario, we hold that where a suspect voluntarily reinitiates discussions related to the investigation, he effectively clarifies the earlier ambiguous request for counsel. At that point, investigators have no further obligation to pursue the suspect's indecision and may resume the interview. McLaren's confession was otherwise voluntary and properly admitted in evidence against him. His Fifth Amendment rights were not violated.

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[5] Our holding on this issue is specific to the facts in this case. We strongly encourage investigators (and those responsible for their training) to follow the guidance of *Fouche* and *Mathis, supra.* In *Fouche,* when the suspect indicated he "might want to talk to a lawyer" and that he wanted to make a telephone call, Federal Bureau of Investigation agents immediately stopped the interrogation, permitted him to make a call in private, readvised him of his rights, and asked him whether he understood his rights and wished to waive them. Before resuming the interrogation, the agents ascertained the the suspect had not telephoned an attorney. 833 F.2d at 1285-86. In *Mathis,* OSI agents chose the most direct approach to resolve the suspect's confused reference to counsel: "[I]f you want a lawyer, we'll stop right now and I'll get you a lawyer. . . . *Do you want a lawyer*?" 31 M.J. at 727 (emphasis added). The agents' conduct in these cases stands above reproach and avoids suspicion of ulterior motive or design. Their conduct provides a model for investigators who are confronted with ambiguous behavior or an unclear reference to counsel.

III

Appellant next alleges the military judge erred when he denied a defense challenge for cause against a court member who refused to consider the sentencing option of "no punishment."

In response to the defense counsel's initial inquiries on *voir dire* of the panel, the member in question indicated he could not consider imposing no punishment.[6] During individual *voir dire* by counsel, he first reiterated his earlier statement, then indicated that upon a review of all the facts, he could consider a level of punishment that was not very severe. He also stated he did not have any moral conviction that would inflame his passions and lead him to recommend a severe sentence. Additionally, in response to a question by the military judge, he replied that he could

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[6] The defense counsel's opening *voir dire* questions were:

> Q: Would all of you agree with me that what you have in front of you and what Sergeant McLaren has pled guilty to and been found guilty of are some of the most serious offenses known to the law?
>
> Q: The reason I ask you that at this point in the trial, according to the judge's instructions, you are not to have any particular sentence in mind, either lenient or very severe, or any kind of a sentence. . . . [A]t one point in the trial, the judge is going to tell you that no punishment is an option. Without regard to whether that is a reasonable or a ridiculous idea at this point in time, without having any presentation of evidence, is there anyone on this jury that can honestly and seriously consider no punishment just by what you've read in front of you?

The defense counsel polled all eleven members individually on their answers to the second question. Nine of the eleven responded that they could *not* consider the option. The defense counsel then pursued the issue during individual *voir dire* of four of the members, challenged two for cause, and, upon the judge's denial of the challenges, exercised his peremptory challenge against one of the two. The remaining challenged member is the subject of the assigned error.

discuss and deliberate with the other members and vote on an appropriate sentence based on the facts presented and the law as given by the military judge.

It is axiomatic that an accused is entitled to be tried by court members who will keep an open mind and arrive at an appropriate sentence in accordance with the evidence presented at trial and the law as announced by the trial judge. *United States v. Reynolds,* 23 M.J. 292 (C.M.A. 1987). To help assure courts-martial are free from any taint of illegality, unfairness, or partiality, R.C.M. 912(f) delineates a number of bases for challenges and removal for cause.

As the Court of Military Appeals has urged, we strongly encourage military judges to be liberal in granting challenges under this rule. *Reynolds,* 23 M.J. at 294; *United States v. Smart,* 21 M.J. 15, 21 (C.M.A. 1985). Recognizing, however, the advantageous position of the military judge in assessing potential bias, as well as the many factors that he must balance quickly and without opportunity for reflection, we will reverse a ruling on a challenge only if we find a clear abuse of discretion. *United States v. Hawks,* 19 M.J. 736 (A.F.C.M.R. 1984).

To find an abuse of discretion requires much "more than a difference in . . . opinion. . . . The challenged action must . . . be found to be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous' in order to be invalidated on appeal." *United States v. Yoakum,* 8 M.J. 763, 768 (A.C.M.R. 1980), *aff'd on other grounds,* 9 M.J. 417 (C.M.A. 1980), *quoting United States v. Glenn,* 473 F.2d 191, 196 (D.C. Cir. 1972); *see also United States v. Travers,* 25 M.J. 61, 62 (C.M.A. 1987). If we find such abuse, we do not hesitate to set aside a conviction. *See United States v. Abdelkader,* __ M.J. __, (A.F.C.M.R. 23 January 1992). In this case, however, we do not find that the trial judge abused his discretion.

A ground for challenge exists if a member demonstrates an "inelastic attitude" toward sentencing responsibilities. *United States v. Davenport,* 17 M.J. 242, 245 (C.M.A. 1984); *United States v. Tippit,* 9 M.J. 106, 107 (C.M.A. 1980). One is not automatically disqualified, however, because of an expression of an unfavorable inclination toward a particular offense. *Reynolds,* 23 M.J. at 294; *United States v. Fort,* 16 U.S.C.M.A. 86, 90, 36 C.M.R. 242, 245-46 (1966). Similarly, an articulation of a predisposition toward adjudging a particular form of punishment is not in and of itself disqualifying. *United States v. McGowan,* 7 M.J. 205, 206 (C.M.A. 1979); *United States v. Blevins,* 17 M.J. 678, 680 (A.C.M.R. 1988). "Rather, the test is whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions." *McGowan,* 7 M.J. at 206. Additional *voir dire* is the vehicle for clarifying a member's attitude toward sentencing. *Smart,* 21 M.J. at 19-20.

In this case, the member's initial response, seeming to foreclose the "no punishment" option, was predicated solely upon his review of the charges of which appellant stood convicted. His bluntly honest answer voiced a sentiment that is difficult to avoid when one is confronted with a naked description of appellant's crimes.[7] His subsequent responses, though, showed that he would review the evidence before reaching a decision and would follow the

---

[7] The Court of Military Appeals, reviewing a general court-martial involving a sexual assault on an elderly woman, commented:

> Some offenses are so heinous or so repugnant to common decency that the first thought of a court member might well be that the accused should, if convicted, be sentenced to a punitive discharge. A provisional impression of this kind is practically unavoidable.

Fort, 16 U.S.C.M.A. at 89, 36 C.M.R. at 245.

judge's instructions. Although the member could have been questioned more thoroughly by the military judge, we are satisfied that he did not have an "inelastic attitude" toward punishment. Hence, we find that the military judge did not abuse his discretion in denying the challenge.[8]

IV

Finally, appellant contends the military judge erred when, in response to a court member's question, he informed the members of the existence of parole and good time credit. The following occurred during a break from deliberations:

> PRES: The final question, Your Honor, is concerning parole. Is there parole from a military sentence?
>
> MJ: There is parole within the military and the federal system, both, and there's also good time

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[8] Although we do not find that the judge abused his discretion, another matter requires our attention. In an out-of-court hearing prior to individual *voir dire,* the military judge stated that "the mere statement in the abstract that the member cannot on the basis of findings of guilty of these charges entertain the possibility of no punishment is not in my view a disqualifying factor." *See United States v. Deain,* 5 U.S.C.M.A. 44, 49, 17 C.M.R. 44, 49 (1954). In his ultimate ruling on the challenges for cause, the judge referred to the earlier comment as a basis for denial. The judge's comment was an incomplete paraphrase of the law as stated in *McGowan.* 7 M.J. at 206. Despite the comment, the military judge invited the defense counsel to pursue the issue during individual *voir dire* of the members. Since the issue was explored through further questioning by both trial and defense counsel and the military judge, we do not find the judge's misstatement of the law to be prejudicial error. His ultimate ruling denying the challenges, though referencing the earlier comment, was within the broad range of judicial discretion.

credit. But I'm not going to instruct you in detail on that procedure because it's nothing that you can do anything about and you can't take that into consideration in adjudging what you believe to be an appropriate sentence.

PRES: I see.

MJ: That's within the purview of other authorities.

PRES: Very good, Sir. . . .

In response to a defense request for further insturctions, the military judge reemphasized to the members that those factors were not for their consideration:

MJ: Right. As I've indicated, you should adjudge what you believe to be an appropriate sentence without relying on mitigating action by any authority in the case.

PRES: Your point has been taken, Your Honor.

The administrative procedures that permit penal authorities to adjust a prisoner's release date are collateral to the sentencing function. Hence, when fashioning an appropriate sentence, the court should not speculate as to any administrative relief that might be granted during confinement. It is well-established that an accused should be sentenced without regard to any collateral administrative consequences of the punishment. *United States v. Henderson,* 29 M.J. 221 (C.M.A. 1989); *United States v. Murphy,* 26 M.J. 454 (C.M.A. 1988); *United States v. Griffin,* 25 M.J. 423 (C.M.A.), *cert. denied,* 487 U.S. 1206 (1988); *United States v. Quesinberry,* 12 U.S.C.M.A. 609, 612, 31 C.M.R. 195, 198 (C.M.A. 1962); *but cf. United States v. Rosato,* 32 M.J. 93 (C.M.A. 1991) (error to bar accused from commenting in unsworn statement on collateral matters about return-to-duty program).

It is not necessarily error, however, for a military judge to answer court members' questions on collateral consequences of sentencing alternatives. *Griffin,* 25 M.J. at 425; *United States v. Nixon,* 30 M.J. 501, 506 (A.F.C.M.R. 1989).[9] In this case, the military judge merely acknowledged the existence of two related mechanisms for administrative relief—one of which the members had apparently discussed. In subsequent comments, he clearly directed the members not to consider those or any similar extraneous matters during their deliberations. We conclude that this explicit guidance was appropriate and adequate to preclude any improper consideration by the members. *See United States v. Ricketts,* 1 M.J. 78 (C.M.A. 1975); *United States v. Cerniglia,* 31 M.J. 804, 806 (A.F.C.M.R. 1990).

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[9] Military judges must tread carefully when responding to a court member's question on such matters. Ordinarily, the appropriate reply is simply to affirm that "collateral consequences are not germane" to the sentencing process. *Griffin,* 25 M.J. at 424. With the accused's permission, though, the judge may venture further. However, that path is fraught with hazards. The answer must be clear, despite the extemporaneity of the occasion. *Id.* It must also be accurate and complete. This is of particular concern, since military judges are less likely to be fully informed as to collateral consequences. *Griffin,* 25 M.J. at 425 (concurring opinion by Everett, C.J.). Finally, the potential for unnecessary confusion, resulting from inundating the members with administrative trivia, must be avoided. *Quesinberry,* 12 U.S.C.M.A. at 612, 31 C.M.R. at 198; *see* Mil. R. Evid. 403.

V

The approved findings of guilty and the sentence are correct in law and fact and, on the basis of the entire record, are

AFFIRMED.

Senior Judge LEONARD and Judge JAMES concur.

[SEAL]

OFFICIAL
/s/ Pamela D. Stevenson
PAMELA D. STEVENSON
Captain, USAF
Chief Commissioner

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No. 93-894

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

DONALD W. MCLAREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether, when a suspect reinitiates a custodial interview after invoking his right to counsel, the suspect's resulting admissions can be admitted into evidence.

2. Whether the Judge Advocate General of an Armed Force, who is not authorized to make appointments under the Appointments Clause of the Constitution, may appoint commissioned officers to serve as military trial and appellate judges.

3. Whether the Due Process Clause of the Fifth Amendment requires that military trial and appellate judges be appointed to their judicial duties for fixed terms.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-20a) is reported at 38 M.J. 112. The opinion of the Air Force Court of Military Review (Pet. App. 21a-38a) is reported at 34 M.J. 926.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 28, 1993. The petition for a writ of certiorari was filed on December 7, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1992).

STATEMENT

Petitioner, a member of the United States Air Force, was convicted by a general court-martial of attempted rape, rape, sodomy (2 specifications), and committing indecent acts with his step-daughters (3 specifications), in violation of Articles 80, 120, 125, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880, 920, 925, and 934. He was sentenced to a dishonorable discharge, confinement for 35 years, forfeiture of $424 pay per month for 420 months, and reduction to the lowest enlisted grade. The convening authority reduced the confinement to 15 years pursuant to a pretrial agreement, but otherwise approved the sentence. The Air Force Court of Military Review affirmed the findings and approved the sentence. Pet. App. 38a. The Court of Military Appeals affirmed. Pet. App. 1a-20a.

On April 15, 1990, Special Agent Sarantis of the Air Force Office of Special Investigations received a complaint that petitioner had been sexually abusing the older of his two step-daughters. The following day, Sarantis interviewed both step-daughters at the base clinic. On April 17, Sarantis went to petitioner's on-base quarters intending to advise petitioner's wife of the allegations against her husband and to ask her to accompany him to the base clinic. Both petitioner and Mrs. McLaren answered the door. Sarantis told Mrs. McLaren that he needed to speak with her at the clinic. Mrs. McLaren went to the clinic with Sarantis and Special Agent Bianco, while petitioner followed in another car. When they reached the clinic, petitioner asked what was going on. Sarantis responded that he would talk to petitioner later. Pet. App. 3a.

Later that day, Agents Sarantis and Bianco returned to petitioner's quarters and Sarantis asked to talk to petitioner. The three drove to the clinic in a government vehicle and entered a conference room in the clinic where Sarantis read petitioner the warnings prescribed by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and Article 31(b), UCMJ, 10 U.S.C. 831(b). See *United States* v. *Tempia*, 37 C.M.R. 249 (C.M.A. 1967). Agent Sarantis then informed petitioner that he was suspected of rape, carnal knowledge, and assault with a deadly weapon. When Sarantis asked petitioner if he wanted a lawyer, petitioner responded, "Not at this time." Petitioner then indicated that he wanted to talk. Pet. App. 3a.

After some preliminary questions, Agent Sarantis steered the conversation toward the allegations of sexual abuse. Sarantis asked petitioner when he first had sex with his older step-daughter. Petitioner responded, "These things happen." Sarantis then repeated the question. At that point, petitioner looked down and said something to the effect of "I think I want a lawyer," or "I think I need to talk to a lawyer." Sarantis responded, "Well, yes, these charges seem —are serious." Agent Bianco said, "Yes, this is a decision you'll have to make. We can't force you to stay here. You need to decide what you want to do." Pet. App. 3a-4a.

After a brief pause, without further questions or comments from the two agents, petitioner "began talking again." Petitioner responded to Sarantis's last question, saying, "It just happened." The interview then resumed, and petitioner confessed. His oral confession was then typed, signed, and sworn to. Pet. App. 4a.

Prior to entering conditional pleas of guilty, petitioner moved to suppress his April 17, 1990, confession. The defense maintained that his statements were taken in violation of Article 31, UCMJ, 10 U.S.C. 831, and the Fifth Amendment to the United States Constitution. The military judge denied the defense motion, finding that "[a]fter a pause, and apparent reflective deliberation about his verbalized thoughts concerning his perceived need for a lawyer, [petitioner] resumed the interrogation process by proceeding to answer the incriminatory question previously posed." Additionally, the judge found that "[t]he agents reasonably construed this resumption by the accused as an election by him not to then act on his perceived need, if any, for a lawyer." Pet. App. 5a.

DISCUSSION

1. Petitioner argues (Pet. 7-10) that his remark about getting a lawyer was, at the least, an ambiguous reference to counsel, and that the agents should have "cease[d] all questioning once petitioner mentioned the word 'attorney.'" Pet. 10. He contends that the issue presented in this case is the same as the issue presented in *Davis* v. *United States*, cert. granted, No. 92-1949 (Nov. 1, 1993).

Contrary to petitioner's contention, this case does not present the question presented in *Davis*. In this case, the military judge, the court of military review, and the Court of Military Appeals all found that petitioner did not make an ambiguous request for counsel that was followed by questioning designed to clarify that request. Instead, all three courts found that after petitioner made his statement about a lawyer, the interrogation ceased. Petitioner then

paused and re-initiated the interrogation himself. See Pet. App. 5a, 7a, 8a, 28a.[1]

The Court of Military Appeals analyzed the case "as if [petitioner] had unequivocally requested a lawyer." Pet. App. 7a. At that juncture, the court concluded, petitioner's responses to further interrogation were admissible only if petitioner both initiated further discussion with the agents and knowingly and intelligently waived the right he had invoked. *Ibid.* Agreeing with the findings of the two lower courts, the Court of Military Appeals concluded that petitioner had done both. The court explained (Pet. App. 8a):

> [Petitioner] initiated the conversation by talking after the agents told him that they could not force him to stay and that he needed to make a decision; he waived his previously invoked right to counsel by answering the previously asked question which had preceded his mention of a lawyer. We are satisfied that [petitioner's] voluntary reinitiation of the interview and implied waiver of his previously invoked right to counsel were sufficient to satisfy *Miranda* v. *Arizona* * * * .

In light of the findings of the military courts, the legal issue in this case is whether petitioner can validly be charged with having reinitiated the interview, so that his earlier request for counsel—even assuming it to be unambiguous—was no longer effective. In *Oregon* v. *Bradshaw*, 462 U.S. 1039

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[1] The Court of Military Review concluded that petitioner's interrogation was custodial and that he was therefore properly (and necessarily) advised of his right to the presence of counsel. Pet. App. 26a n.2.

(1983), this Court held that conduct similar to petitioner's conduct in this case was sufficient to constitute "reinitiation" of the interview at the behest of the suspect, and thus to relieve the agents of any further obligation not to question the suspect in the absence of counsel.

Nothing that the agents said to petitioner after he made his remark about obtaining a lawyer could fairly be construed as designed to dissuade him from seeking the advice of counsel. In fact, the agents' brief comments—to the effect that the charges were indeed serious and that the agents could not compel petitioner to remain—suggested that seeking counsel was a wise course and one that petitioner was free to pursue. When petitioner then decided to resume the interview by answering the last question that Agent Sarantis had asked, it was reasonable for the military courts to conclude that petitioner in effect reinitiated the interrogation and implicitly waived the right he had arguably previously invoked. In light of the factual findings of the lower courts, the issue in this case is simply whether the military courts properly applied the principles of *Oregon* v. *Bradshaw* to this factually similar case. That question neither calls for this Court's review nor requires that this petition be held pending the Court's resolution of the quite distinct issue presented in *Davis* v. *United States*.

2. Petitioner next argues (Pet. 10-13) that the military trial and appellate judges in his case were appointed in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, and that the lack of fixed tenure for the judges in his case rendered the proceedings against him fundamentally unfair.

Those questions are the same as those presented in *Weiss* v. *United States*, No. 92-1482 (argued Nov. 3, 1993), which is pending before the Court. Accordingly, we believe that this petition should be held until this Court has decided *Weiss* and should then be disposed of as appropriate in light of the Court's decision in that case.[2]

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[2] We note that petitioner did not raise either claim at any stage of his case. What is more, no military court addressed those questions in his case. Accordingly, it is not clear that they are subject to review by certiorari in this Court. The statutes providing for certiorari review of the judgments of the Court of Military Appeals, 10 U.S.C. 867a(a) (Supp. IV 1992) and 28 U.S.C. 1259(3) (Supp. IV 1992), restrict this Court's certiorari jurisdiction to "[d]ecisions" of the Court of Military Appeals. Article 67a(a) of the UCMJ, 10 U.S.C. 867a(a) (Supp. IV 1992), further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory authority to limit decisions in any case to less than all the issues urged by the accused. Article 67(c), UCMJ, 10 U.S.C. 867(c) (Supp. IV 1992). Since petitioner did not raise those issues for review by the Court of Military Appeals and since that court did not pass on them, there is a question whether that court rendered a decision on those issues.

It is unnecessary to answer that question in this case, however, because the Court of Military Appeals has indicated that it will accept out-of-time requests for relief from servicemembers if this Court grants relief to servicemembers in any of the other cases presently pending before the Court raising the same issues. *United State* v. *Rice*, 36 M.J. 264 (C.M.A. 1993). Thus, if this Court grants relief to the petitioners in *Weiss*, it may be appropriate to allow the Court of Military Appeals to decide whether to grant relief to parties such as petitioner, since that course may render moot the question whether this Court can grant relief to such parties.

CONCLUSION

With respect to questions 2 and 3, the petition for a writ of certiorari should be held pending this Court's decision in *Weiss v. United States*, No. 92-1482, and then disposed of in light of the Court's decision in that case. In all other respects, the petition should be denied.

Respectfully submitted.

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